FILED

03 554 SEP 26 2003

OFFICE OF THE CLERK

No. 03-

IN THE

Supreme Court of the United States

HUNT HEALTH SYSTEMS, LTD.,
P&G ENTERPRISES, INC., MHTJ INVESTMENTS, INC.,
ESPERANZA HEALTH SYSTEMS, LTD.,
AND FRIENDSHIP, INC.,

Petitioners.

v.

RAYMOND H. WECHSLER, Administrative Trustee of the Towers Financial Corporation Administrative Trust, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

BROOKS BANKER
BROOKS BANKER
551 Fifth Avenue
New York, NY 10176
(212) 972-0534

Counsel for Petitioners

On the Brief:
ANTHONY RELLA

183236

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

67 pp

QUESTION PRESENTED

Plaintiff sued to enforce a factoring contract between defendant Hunt Health Systems Ltd. ("Hunt Health"), a Texas drug and alcohol rehabilitation hospital, and Towers Financial Corp. ("Towers"), one of the largest Ponzi schemes in United States history. Defendants moved for summary judgment arguing that, unknown to Hunt Health, the contract was an integral part of Towers' Ponzi scheme and was, therefore, void on the grounds of public policy. The District Court denied defendants' motion, concluding that defendants' had waived the public policy defense and that assertion of the defense would prejudice plaintiff. Even though the District Court specifically found that defendants had presented evidence raising a genuine issue as to whether or not the contract violated public policy, the District Court held that it would not consider the public policy defense at trial.

On October 15, 2002, defendants filed a petition for writ of mandamus with the United States Court of Appeals for the Second Circuit. Defendants argued that mandamus relief was appropriate because, *inter alia*, (1) the defense of public policy can never be waived and (2) once a court concludes that there is evidence that an agreement violates public policy, it must resolve the public policy issue. Accordingly, defendants requested that the District Court be ordered to resolve the public policy issue at trial, before resolving any other issues. On April 24, 2003, the Second Circuit directed opposing counsel, and invited the District Court, to respond to defendants' petition. On July 2, 2003, the Second Circuit denied defendants' petition, concluding that defendants' petition failed to raise any exceptional circumstances justifying mandamus relief.

The issue before this Court is whether the Second Circuit erred in concluding that defendants' petition for a writ of mandamus should be denied?

LIST OF PARTIES AND RULE 29.6 STATEMENT

The caption of the case contains the names of all the parties to the proceedings before the court of appeals.

Three of the petitioners, P&G Enterprises, Inc., MHTJ Investments, Inc. and Friendship, Inc., are corporate entities. None of the aforementioned petitioners have a parent corporation. There is no publicly held company that owns 10% or more of the stock of any of the aforementioned petitioners.

TABLE OF CONTENTS

	Page
Question Presented	i
List of Parties and Rule 29.6 Statement	ii
Table of Contents	iii
Table of Cited Authorities	v
Table of Appendices	xiii
Opinions Below	1
Statement of Jurisdiction	2
Statute Involved	2
Statement of the Case	3
Summary of Argument	9
Argument	10
I. Petitioner's Right To Mandamus Relief Is Clear And Indisputable	11
A. The District Court Must Resolve The Public Policy Issue Before Enforcing The Contract	12

Contents

	Page
B. The Public Policy Defense Cannot Be Waived	16
II. Petitioner Has No Other Adequate Means To Obtain The Desired Relief	21
Conclusion	24

TABLE OF CITED AUTHORITIES

Page

Cases:

Allied Chemical Corp. v. Daiflon, Inc., 449 U.S. 33, 101 S. Ct. 188, 66 L. Ed. 2d 193 (1980) 10

Bateman Eichler, Hill Ricjards, Inc. v. Berner, 472 U.S. 299, 105 S. Ct. 2622, 86 L. Ed. 2d 215 (1985) 13

Beasley v. Texas & P. Ry. Co., 191 U.S. 492, 24 S. Ct. 164, 48 L. Ed. 274 (1903) 13, 16, 21

Block v. First Blood Associates, 988 F.2d 344 (2d Cir. 1993) 18

California Pacific Bank v. Small Business Admin., 557 F.2d 218 (9th Cir. 1977) 15

Carribean Trading & Fidelity Corp. v. Nigerian Nat'l Petroleum Corp., 948 F.2d 111 (2d Cir. 1991), *cert. denied*, 504 U.S. 910, 112 S. Ct. 1941, 118 L. Ed. 2d 547 (1992) 10

Church of Scientology Intern. v. Time Warner, Inc., 1998 WL 575194 (S.D.N.Y. Sept. 9, 1998), *aff'd*, 238 F.3d 168 (2d Cir.), *cert. denied*, 534 U.S. 814, 122 S. Ct. 40, 151 L. Ed. 2d 13 (2001) 18

Cohen v. West Haven Bd. of Police Com'rs, 638 F.2d 496 (2d Cir. 1980) 20

Cited Authorities

Page

Dinsmore v. Squadron, Ellenoff, Plesent, Sheinfeld & Sorkin, 135 F.3d 837 (2d Cir. 1998) 3

Fieger v. Pitney Bowes Credit Corp., 2002 WL 31082955 (S.D.N.Y. Sept. 17, 2002) 19

Foman v. Davis, 371 U.S. 178, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962) 18

Ful-Vue Sales Co. v. American Optical Co., 118 F. Supp. 517 (S.D.N.Y. 1953) 14, 16

General Star Indem. Co. v. Platinum Indem. Ltd, 2001 WL 883649 (S.D.N.Y. Aug. 7, 2001) 16, 19

Helstoski v. Meanor, 442 U.S. 500, 99 S. Ct. 2445, 61 L. Ed. 2d 30 (1979) 21

Holman v. Johnson, 1 Cowp. 341, 98 Eng. Rep. 1120 (K.B. 1775) 13

I.U.B.A.C. Local Union No. 31 v. Anastasi Bros. Corp., 600 F .Supp. 92 (S.D. Fla. 1984) 16

In re Austrian, German Holocaust Litigation, 250 F.3d 156 (2d Cir. 2001) 21

In re Dinova, 212 B.R. 437 (2d Cir. Bankr. App. Panel 1997) 20

Cited Authorities

Page

In re F.C.C., 217 F.3d 125 (2d Cir.), *cert. denied*, *Next Wave Personal Communications, Inc. v. F.C.C.*, 531 U.S. 1029, 1215 S. Ct. 606, 148 L. Ed. 2d 518 (2000) 10, 21, 23

In re Independent Clearing House Co., 77 B.R. 843 (D. Utah 1987) 12

In re Towers Financial Corp. Noteholders Litigation, 1995 WL 571888 (S.D.N.Y. Sept. 20, 1995), *report and recommendation adopted*, 936 F. Supp. 126 (S.D.N.Y. 1996) 3

Insurance Co. of Am. v. S/S Cape Charles, 1994 WL 263592 (S.D.N.Y. June 3, 1994), *aff'd* 122 F.3d 1056 (2d Cir. 1995) 15, 16, 18

Kaiser-Frazer Corp. v. Otis & Co., 195 F.2d 838 (2d Cir.), *cert. denied*, 344 U.S. 856, 73 S. Ct. 89, 97 L. Ed. 664 (1952) 13, 14, 16

Kaiser Steel Corp. v. Mullins, 455 U.S. 72, 102 S. Ct. 851, 70 L. Ed. 2d 833 (1982) 12-13, 14, 23

Kerr v. United States District Court, 426 U.S. 394, 96 S.Ct. 2119, 48 L. Ed. 2d 725 (1976) 21

Kidder, Peabody & Co. v. IAG Int'l Acceptance Group, 1999 WL 11553 (S.D.N.Y. Jan. 13, 1999) 16, 18

Cited Authorities

Page

Lee v. Johnson, 116 U.S. 48, 6 S. Ct. 249, 29 L. Ed. 570 (1885) 14, 16, 21

Mallard v. U.S. Dist. Court for Southern Dist. of Iowa, 490 U.S. 296, 109 S. Ct. 1814, 104 L. Ed. 2d 318 (1989) 10

Marock Intern., Inc. v. Brinkmann Corp., 1993 WL 349684 (S.D.N.Y. Sept. 13, 1993) 15

McLee v. Chrysler Corp., 38 F.3d 67 (2d Cir. 1994) 15

McMullen v. Hoffman, 174 U.S. 639, 19 S. Ct. 839, 43 L. Ed. 1117 (1899) 12

N.L.R.B. v. Local 46, Metallic Lathers Union and Reinforcing Iron Workers of New York and Vicinity of the Intern. Ass'n of Structural and Ornamental Iron Workers, 149 F.3d 93 (2d Cir. 1998) 13

*Nomura Securities, Int'l v. E*Trade Securities, Inc.*, 2003 WL 22058235 (S.D.N.Y. Sept. 4, 2003) ... 12

Noonan v. Gilbert, 63 App.D.C. 30, 68 F.2d 775 (D.C. Cir. 1934) 15

Northern P. R. Co. v. Washington, 142 U.S. 492, 35 L. Ed. 1092, 12 Sup. Ct. Rep. 283 (1892) ... 13, 16

Cited Authorities

Page

Nyhus v. Travel Management Corp., 466 F.2d 440, 151 U.S.App.D.C. 269 (D.C. Cir. 1972) 15, 16

Oscanyan v. Arms Co., 103 U.S. 261, 26 L. Ed. 539 (1880) 14, 16, 21

Peralta Carriers Corp. v. Westvaco Corp., 1989 WL 433172 (S.D.N.Y. June 21, 1989) 19, 20

Pereira v. Cogan, 2002 WL 1822928 (S.D.N.Y. Aug. 7, 2002) 6

Pharmaceutical Sales and Consulting Corp. v. J.W.S. Delavau Co., Inc., 106 F. Supp. 2d 761 (D.N.J. 2000) 16

Richardson v. Greenshields Securities, Inc., 825 F.2d 647 (2d Cir. 1987) 17

Roberts v. Criss, 266 F. 296 (2d Cir. 1920) 14, 16, 21

Roche v. Evaporated Milk Assn., 319 U.S. 21, 63 S. Ct. 938, 87 L. Ed. 1185 (1943) 10

Sagmel, Inc. v. Firebird Int'l Inc., 1995 WL 39460 (N.D. Ca. Jan. 31, 1995) 15, 16

Schlagenhauf v. Holder, 379 U.S. 104, 85 S. Ct. 234, 13 L. Ed. 2d 152 (1964) 10

Cited Authorities

Page

Sheffield Commercial Corp. v. Clemente, 792 F.2d 282 (2d Cir. 1986) 15, 18, 20

Shelley v. Kraemer, 334 U.S. 1, 68 S. Ct. 836, 92 L. Ed. 1161 (1948) 16

Sierra Rutile Ltd. v. Katz, 937 F.2d 743 (2d Cir. 1991) 10

State Teachers Retirement Bd. v. Fluor Corp., 654 F.2d 843 (2d Cir. 1981) 18

U.S. East Telecommunications, Inc. v. United States, 15 F.3d 261 (2d Cir. 1994) 17

Union Carbide Corp. v. U.S. Cutting Service, Inc., 782 F.2d 710 (7th Cir. 1986) 23

United States v. Balistrieri, 779 F.2d 1191 (7th Cir. 1985), *cert. denied*, *DiSalvo v. United States*, 475 U.S. 1095, 106 S. Ct. 1490, 89 L. Ed. 2d 892 (1986) 22-23

United States v. Big Apple Indus. Bldgs., Inc., 1993 WL 437787 (S.D.N.Y. Oct 26, 1993) 18

United States v. Bonanno Organized Crime Family of La Cosa Nostra, 879 F.2d 20 (2d Cir. 1989) ... 12

United States v. Hoffenberg, 164 F.3d 620, 1998 WL 695933 (2d Cir. Sept. 22, 1998) 3

Cited Authorities

Page

United States v. International Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, 907 F.2d 277 (2d Cir. 1990) 22

United States v. Krieger, 773 F. Supp. 580 (S.D.N.Y. 1991) 21

United States v. Rosoff, 242 F.3d 369, 2000 WL 1847105 (2d Cir. Dec. 15, 2000), *cert. denied*, *Brater v. United States*, 532 U.S. 1001, 121 S. Ct. 1670, 149 L. Ed. 2d 650 (2001) 3

Virgin Atlantic Airways, Ltd v. National Mediation Board, 956 F.2d 1245 (2d Cir), *cert. denied*, 506 U.S. 820, 113 S. Ct. 67, 121 L. Ed. 2d 34 (1992) 20

Wallace Oil Co., Inc. v. Michaels, 839 F. Supp. 1041 (S.D.N.Y. 1993) 16

Walters v. Fullwood, 675 F. Supp. 155 (S.D.N.Y. 1987) 12

Wechsler v. Long Island Rehabilitation Center of Nassau, Inc., 1996 WL 590679 (Mass. Super. Sept. 4, 1996) 5

Wilder v. Bernstein, 645 F. Supp. 1292 (S.D.N.Y. 1986), *aff'd*, 848 F.2d 1338 (2d Cir. 1988) 21

Cited Authorities

Page

Statutes:

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1332 3

28 U.S.C. § 1651 ..... 2, 8

Rules

Fed. R. Civ. P. 8(c) 20

Treatises

15 Corbin on Contracts § 1533 21

TABLE OF APPENDICES

Page

Appendix A — Order Of The United States Court Of Appeals For The Second Circuit Denying Application For A Writ Of Mandamus Filed July 2, 2003 ..... 1a

Appendix B — Order Of The United States Court Of Appeals For The Second Circuit Filed April 24, 2003 ..... 3a

Appendix C — Opinion And Order Of The United States District Court For The Southern District Of New York Dated August 27, 2002 ..... 5a

OPINIONS BELOW

The opinion of the Court of Appeals denying petitioner's application for a writ of mandamus (Pet. App. A) is unreported. The opinion of the District Court denying petitioner's motion for summary judgment based upon public policy (Pet. App. C) is reported at 216 F. Supp. 2d 347 (S.D.N.Y. 2002).

Additional decisions in the case are reported as follows:

Wechsler v. Hunt Health Systems, Ltd., 1999 WL 397751 (S.D.N.Y. June 16, 1999)

Wechsler v. Hunt Health Systems, Ltd., 1999 WL 672902 (S.D.N.Y. Aug. 27, 1999)

Wechsler v. Hunt Health Systems, Ltd., 186 F. Supp. 2d 402 (S.D.N.Y. 2002).

Wechsler v. Hunt Health Systems, Ltd., 198 F. Supp. 2d 508 (S.D.N.Y. 2002)

Wechsler v. Hunt Health Systems, Ltd., 2002 WL 31106348 (S.D.N.Y. Sept. 20, 2002)

Wechsler v. Hunt Health Systems, Ltd., 2003 WL 470330 (S.D.N.Y. Feb. 25, 2003)

Wechsler v. Hunt Health Systems, Ltd., 2003 WL 21878815 (S.D.N.Y. Aug. 08, 2003)

Wechsler v. Hunt Health Systems, Ltd., 2003 WL 21998980 (S.D.N.Y. Aug. 22, 2003)

Wechsler v. Hunt Health Systems, Ltd., 2003 WL 21998985 (S.D.N.Y. Aug. 22, 2003)

Wechsler v. Hunt Health Systems, Ltd., 2003 WL 22024043 (S.D.N.Y. Aug. 27, 2003)

STATEMENT OF JURISDICTION

The present application stems from an order issued by the United States Court of Appeals for the Second Circuit entered on July 2, 2003, denying petitioner's application for a writ of mandamus.

Jurisdiction is proper in this Court pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

This case involves the following provision of the All Writs Act:

28 U.S.C. § 1651 ("Writs")

> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

28 U.S.C. § 1651(a).

STATEMENT OF THE CASE

The action underlying this petition was commenced in November 1994 by Alan Cohen, as Chapter 11 Trustee of Towers Financial Corporation ("plaintiff").[1] In his complaint, plaintiff sought damages against defendants for, *inter alia*, the alleged breach of a factoring agreement between defendant Hunt Health and Towers.[2] In January 1995, defendants answered and filed counterclaims. Plaintiff filed his answer to defendants' counterclaims in February 1996.[3]

In July 1998, the parties filed cross-motions for summary judgment. By September 1998, those motions were fully submitted.

---

1. Plaintiff, Raymond Wechsler, was the successor Administrative Trustee to Mr. Cohen. Mr. Wechsler is now pursuing this action in his personal capacity.

2. By all accounts, Towers Financial Corporation was one of the largest Ponzi schemes in United States history. *See United States v. Hoffenberg*, 164 F.3d 620, 1998 WL 695933 (2d Cir. Sept. 22, 1998); *United States v. Rosoff*, 242 F.3d 369, 2000 WL 1847105 (2d Cir. Dec. 15, 2000), *cert. denied*, *Brater v. United States*, 532 U.S 1001, 121 S. Ct. 1670, 149 L. Ed. 2d 650 (2001); *Dinsmore v. Squadron, Ellenoff, Plesent, Sheinfeld & Sorkin*, 135 F.3d 837 (2d Cir. 1998). An exhaustive review of the essential context of Towers' criminal enterprise under which the parties to this action entered into their agreement is set forth in the Report and Recommendation of Magistrate Peck to Judge Knapp, *See, e.g., In re Towers Financial Corp. Noteholders Litigation*, 1995 WL 571888 (S.D.N.Y. Sept. 20, 1995) (Peck, M.J.), *report and recommendation adopted*, 936 F. Supp. 126 (S.D.N.Y. 1996) (Knapp, J).

3. The District Court has jurisdiction over the action underlying this petition pursuant to 28 U.S.C. § 1332, governing jurisdiction in diversity cases.

After submission of the parties' first motions for summary judgment, but before the District Court rendered a decision, defendants learned that two principal figures in the Towers Financial Corporation criminal enterprise had been convicted by a jury in the Southern District of New York, Judge Cedarbaum presiding. *See United States v. Mitchell Brater and Michael Rosoff*, 97 CR 336 (MGC) ("*Brater/Rosoff* Trial"). Defendants reviewed the testimony and exhibits of the *Brater/Rosoff* Trial and uncovered admissible evidence of Towers' wrongful purpose in the creation and implementation of its relationship with Hunt Health Systems, Ltd. *See* Defendants' Memorandum Of Law In Support Of Summary Judgment, Mandamus Ex. D.[4]

On June 16, 1999, the District Court issued a decision on the parties' summary judgment motions, among other things, granting plaintiff leave to file an amended complaint to include allegations he argued on summary judgment but had not pleaded.[5] The District Court expressly directed defendants to file an amended answer.[6] *See* Mandamus Ex. J, June Op. at *15 n. 8 ("Plaintiffs amended complaint shall be served and filed by July 12, 1999; and defendants' answer shall be served and filed by July 19, 1999.").

---

4. References herein to "Mandamus Ex." are to the exhibits in support of the mandamus petition defendants submitted before the Second Circuit.

5. For a brief synopsis of facts relevant to the underlying action, *see Wechsler v. Hunt Health Systems, Ltd.*, 1999 WL 397751 at *1-*3 (S.D.N.Y. June 16, 1999) ("June Op."), Mandamus Ex. J.

6. As such defendants did not, as the District Court states, file their amended answer "without seeking leave of the court." *See Wechsler v. Hunt Health Systems, Ltd.*, 216 F. Supp. 2d 347, 349 (S.D.N.Y. 2002) ("Aug. Op."), Pet. App. at 8a.

Plaintiff then recast and rewrote his entire complaint to include contested factual allegations and new claims for breach of the parties' agreement, not included in his original pleading. Based upon the facts as discovered through the *Brater/Rosoff* Trial and in response to plaintiff's amended complaint, defendants amended their answer to include affirmative defenses relating to the ability of Towers to enforce the contract.[7]

In August 1999, plaintiff filed a motion to strike and dismiss defendants' amended answer. Defendants opposed this motion on its merits and, in addition, filed a motion to amend *nunc pro tunc* and to conduct limited further discovery of three individuals in connection with the *Brater/Rosoff* Trial. Before the motions were submitted, plaintiff acquired new counsel, the Boston firm, Gadsby & Hannah, LLP.[8] The motions were fully submitted in November 1999.

In December 1999, with three motions already pending and "over the strenuous objections of defense counsel, [the District Court] granted plaintiff leave to renew his motion for partial summary judgment so that plaintiff's new lawyers would not be 'straightjacketed' by the previous work of their predecessors," Willkie Farr and Gallagher. *See Wechsler v. Hunt Health Systems,*

---

7. According to the District Court, "[t]he [Brater/Rosoff] trial involved the prosecution of former Towers officers who were engaged in an illegal Ponzi scheme for which they relied on the accounts receivable Towers purchased from its health care clients, including Hunt Health." *Wechsler v. Hunt Health Systems, Ltd.*, 186 F. Supp. 2d 402, 416 (S.D.N.Y. 2002) ("Feb. Op."), Mandamus Ex. K.

8. Gadsby & Hannah previously represented Mr. Wechsler as Towers' bankruptcy trustee in the Massachusetts action entitled *Wecshler v. Long Island Rehabilitation Center of Nassau, Inc.*, 93 CV 6946B. (Mass. Super.). *See Wechsler v. Long Island Rehabilitation Center of Nassau, Inc.*, 1996 WL 590679 (Mass. Super. Sept. 4, 1996).

Ltd., 198 F. Supp. 2d 508, 515 (S.D.N.Y 2002) ("April Op."), Mandamus Ex. L. In April 2000, plaintiff submitted a second motion for summary judgment.[9]

In February 2002, the District Court issued a decision on three of the six pending motions. In its opinion, the District Court construed defendants' amended answer as an effort by defendants to switch theories of the case from contract to fraud, and struck a majority of defendants' affirmative defenses, concluding that "such a radical shift in gears would be unduly prejudicial to plaintiff."[10] *See* Mandamus Ex. K, Feb. Op. at 418. The District Court reached its conclusion after noting that the permissible scope of an amended answer in response to an amended complaint is an open question in the Second Circuit.[11] The District Court noted that its decision was based upon prejudice and delay, not upon the merits of any of defendants' claims. *See Id.* at p. 419 n. 9; Pet. App. at 14a-15a, Aug. Op. at 352 ("[T]he Court did not reach the merits of defendants' illegality and fraud defenses and theories" in its February 2002 decision.).

---

9. Plaintiff's renewed motion for partial summary judgment occasioned motions to strike filed by each side in the litigation.

10. Included in defendants' amended answer was the affirmative defense of public policy. However, that defense was focused upon specifically by neither the parties in their submissions nor the District Court in its February Decision.

11. As the District Court recognized, "the Second Circuit has not squarely addressed the precise issue in this case, namely the permissible scope of a supplemental answer in response to a supplemental complaint." Mandamus Ex. K, Feb. Op. at 417. Indeed, in *Pereira v. Cogan*, 2002 WL 1822928 (S.D.N.Y. August 7, 2002), Judge Sweet stated that such cases are "all over the map" and in particular, criticized the holding of "Wechsler-type" cases as presenting "too narrow a view of what 'responsive' answers may be."

In April 2002, the District Court decided the last of the pending motions before it, which were filed in April 2000. The District Court directed the parties to appear for conference on May 6, 2002.

On May 1, 2002, counsel for defendants wrote to the District Court to inform it of defendants' desire to file a renewed motion for summary judgment based upon public policy. In that letter, defendants' counsel outlined state and federal law on the issue of public policy and reminded the District Court of its duty to resolve the public policy issue on its merits. *See* Banker Letter 5/1/02, Mandamus Ex. B. At the May 6, 2002 conference, the parties agreed to an expedited briefing schedule for defendants' motion.

On June 28, 2002, defendants submitted their motion for summary judgment based upon public policy. Drawing upon the *Brater/Rosoff* trial and other evidence obtained without the assistance of plaintiff, defendants documented the extent to which the wrongful purpose of Towers' criminal enterprise encompassed and dominated the relationship between the parties, and detailed the obligation of the District Court to resolve the public policy issue in the interests of justice. *See* Mandamus Exs. D, F (Local Rule 56.1 Statement and Counter-Statement), and G (Defendants' Reply Memorandum of Law). Plaintiff responded with no evidence or law disputing defendants' motion and conceded admissions made in other Towers proceedings concerning Towers' wrongful purpose. *See* Plaintiff's Opposition to Defendants' Motion For Summary Judgment, Mandamus Ex. E. Plaintiff then filed a motion for sanctions.

On August 27, 2002, the District Court, *inter alia*, denied defendants' summary judgment motion and granted plaintiff's sanctions motion. The District Court found that an issue of fact

exists concerning defendants' public policy defense, but ruled that defendants' motion was procedurally unsound because the public policy defense could be waived and had been waived.

On October 11, 2002, defendants filed a petition for a writ of mandamus with the Second Circuit requesting, *inter alia*, that the District Court be required to resolve the public policy defense at trial.[12] On April 24, 2003, the Second Circuit ordered opposing counsel, and invited the District Court, to respond. The District Court submitted its response on May 14, 2003. Therein, the District Court cited no additional law supporting its August opinion.

On July 2, 2003, the Second Circuit denied defendants' petition for mandamus based on its finding that the petition failed to raise an extraordinary circumstance justifying issuance of the writ.

On May 14, 2003, pursuant to an order of the District Court, the parties submitted their proposed joint pre-trial order. Over the objection of defendants, on September 22, 2003, the District Court ordered that the trial in this matter will commence on or about October 20, 2003.[13]

---

12. Jurisdiction in the Court of Appeals is proper under 28 U.S.C. § 1651, in that defendants' petition before that court sought a writ of mandamus.

13. Defendants' objection was based upon the severe hardship the October 20, 2003 trial date will inflict upon one of Hunt Health's principals, a primary witness for defendants residing in Texas, who cannot arrange for the twenty-four hour care of her elderly and severely disabled husband for the two to three weeks required for trial on short notice.

SUMMARY OF ARGUMENT

The District Court explicitly concluded that there is a genuine issue of material fact as to whether the contract plaintiff seeks to enforce violates public policy. Ignoring a century of precedent, however, the District Court also decided that it will not resolve the public policy issue at trial because the defense of public policy would prejudice plaintiff. The District Court's ruling constitutes a clear and indisputable abuse of discretion that the Second Circuit, upon defendants' application for a writ of mandamus, was required to redress.

Once a court becomes aware that public policy considerations may taint a contract before it, the court must resolve the public policy issue, even *sua sponte*, to ensure that the judicial system does not lend its sanction to a wrong. The law is plain – the defense of public policy is never waived.

Here, the District Court's refusal to resolve the public policy question in the face of an unavoidable duty to do so presents a clear-cut case for mandamus. The District Court's ruling that the defense of public policy can be, and has been, waived is an aberration among all reported decisions. The integrity of the judicial system and the rights of defendants require that the issue of public policy be conclusively resolved before the District Court determines whether the contract at issue is otherwise enforceable. Accordingly, only an immediate writ of mandamus compelling the District Court to resolve the issue of public policy at trial will provide adequate relief.

Because the Second Circuit has refused to take action in the face of defendants' clear and indisputable rights, only an order from this Court granting defendants' the full measure of relief requested can assure the due administration of justice in the present case.

ARGUMENT

A writ of mandamus is utilized "'to confine an inferior court to a lawful exercise of its prescribed jurisdiction, or to compel it to exercise its authority when it is its duty to do so.'" *Mallard v. U.S. Dist. Court for Southern Dist. of Iowa*, 490 U.S. 296, 308, 109 S. Ct. 1814, 1822, 104 L. Ed. 2d 318 (1989) (quoting *Roche v. Evaporated Milk Assn.*, 319 U.S. 21, 26, 63 S. Ct. 938, 941, 87 L. Ed. 1185 (1943) (additional citations omitted).[14] Issuance of the writ is appropriate "when there is 'usurpation of judicial power' or a clear abuse of discretion." *Schlagenhauf v. Holder*, 379 U.S. 104, 110, 85 S. Ct. 234, 238, 13 L. Ed. 2d 152 (1964) (citation omitted); *Carribean Trading & Fidelity Corp., v. Nigerian Nat'l Petroleum Corp.*, 948 F.2d 111, 115 (2d Cir. 1991), *cert. denied*, 504 U.S. 910, 112 S. Ct. 1941, 118 L. Ed. 2d 547 (1992) (same).

Mandamus will be granted where (1) the petitioner has demonstrated that its right to such relief is "'clear and indisputable'" and (2) where the petitioner has "no other adequate means to attain the relief he desires." *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 35-36, 101 S. Ct. 188, 190, 66 L. Ed. 2d 193 (1980) (citations omitted). Both of these requirements are satisfied here.

---

14. *See In re F.C.C.*, 217 F.3d 125, 133 (2d Cir.) (Mandamus is available to "forc[e] an inferior court to take an obligatory action."), *cert. denied, Next Wave Personal Communications, Inc. v. F.C.C.*, 531 U.S. 1029, 1215 S. Ct. 606, 148 L. Ed. 2d 518 (2000); *Sierra Rutile Ltd. v. Katz*, 937 F.2d 743, 749 (2d Cir. 1991) ("In fact, one of the clearest traditional uses of mandamus is to compel a court to act when it had no power to refuse [to act].") (citation and internal quotation marks omitted) (alteration in original).

I. PETITIONER'S RIGHT TO MANDAMUS RELIEF IS CLEAR AND INDISPUTABLE

Although it believed it was not compelled to do so, in its August opinion, the District Court specifically addressed what it referred to as the "substance" of defendants' summary judgment submission. *See* Pet. App. at 16a-22a, Aug. Op. at 353-56. After reviewing the evidence and "[d]rawing all reasonable inferences in plaintiff's favor," the District Court concluded, not that defendants' public policy challenge was futile, but that "there remains a genuine issue of material fact with regard to a public policy defense." *Id.* at 22a, Aug. Op. at 356. Despite this conclusion, the District Court ruled that it would not consider the public policy issue at trial because defendants had waived the defense. *Id.*, Aug. Op. at 356.

The implications of the District Court's ruling are compelling. The District Court has held that even though, on the facts and on the law, there is a genuine issue as to whether a contract violates public policy, the Court will enforce the contract as if the public policy issue does not exist due to defects in pleading. This ruling goes against every reported decision on the matter and places the integrity of the judicial system at risk.

Having recognized an important public policy question, the District Court has a duty to resolve the issue before burdening the system or the defendants with consideration of whether or not the contract at hand is otherwise enforceable by plaintiff. Given the District Court's refusal to fulfill its obligation, the Second Circuit has a duty to compel the District Court to action by granting defendants' mandamus petition.

A. The District Court Must Resolve The Public Policy Issue Before Enforcing The Contract

There is "no doubt that illegal promises will not be enforced" by federal courts. *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 77, 102 S. Ct. 851, 856, 70 L. Ed. 2d 833 (1982); *McMullen v. Hoffman*, 174 U.S. 639, 670, 19 S. Ct. 839, 851, 43 L. Ed. 1117 (1899) ("Being of the opinion that the contract proved in this case was illegal, in the sense that it was fraudulent, and entered into for improper purposes, the law will leave the parties as it finds them."); *see United States v. Bonanno Organized Crime Family of La Cosa Nostra*, 879 F.2d 20, 28 (2d Cir. 1989) ("Under both federal and state law, illegal agreements, as well as agreements contrary to public policy, have long been held to be unenforceable and void."); *In re Independent Clearing House Co.*, 77 B.R. 843, 858 (D. Utah 1987) ("For a court to lend its aid to a wrongdoing plaintiff is to lend its sanction to the wrong."); *Walters v. Fullwood*, 675 F. Supp. 155, 160 (S.D.N.Y. 1987) (no court should be required to serve as "paymaster of the wages of crime"); *Nomura Securities, Int'l v. E*Trade Securities, Inc.*, 2003 WL 22058235 at *14 (S.D.N.Y. Sept. 4, 2003) ("if the contract is opposed to the interests of the public, the agreement is void").

This mandate against enforcement has developed "not for the benefit of the defendant, but because public policy demands that [the court's aid] should be denied without regard to the interests of individual parties."[15] *Kaiser Steel Corp.*, 455 U.S.

15. The District Court provides absolutely no support for its statement that the "paramount concern" in cases involving questions of public policy is "the risk of generating a windfall for the moving party." Pet. App. at 19a, Aug. Op. at 354. As the cases cited in the text demonstrate, public policy is designed to serve the interests of justice, not the interests of the parties.

at 77-78, 102 S. Ct. at 856 (citation and internal quotation marks omitted); *N.L.R.B. v. Local 46, Metallic Lathers Union and Reinforcing Iron Workers of New York and Vicinity of the Intern. Ass'n of Structural and Ornamental Iron Workers*, 149 F.3d 93, 108 (2d Cir. 1998) (same); *Beasley v. Texas & P. Ry. Co.*, 191 U.S. 492, 498, 24 S. Ct. 164, 166, 48 L. Ed. 274 (1903) ([T]he very meaning of public policy is the interest of others than the parties, and that interest is not to be at the mercy of the defendant alone.") (citing *Northern P. R. Co. v. Washington*, 142 U.S. 492, 509, 35 L. Ed. 1092, 12 Sup. Ct. Rep. 283 (1892)); *Bateman Eichler, Hill Ricjards, Inc. v. Berner*, 472 U.S. 299, 306 n.12, 105 S. Ct. 2622, 2626 n.12, 86 L. Ed. 2d 215 (1985)

> The objection, that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed. . . . The principle of public policy is this: *ex dolo malo non oritur* [out of fraud no action arises]. . . . It is upon that ground the Court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff.

(quoting in parenthetical *Holman v. Johnson*, 1 Cowp. 341, 343, 98 Eng. Rep. 1120, 1121 (K.B. 1775)) (alterations in original); *Kaiser-Frazer Corp. v. Otis & Co.*, 195 F.2d 838, 843-44 (2d Cir.)

> [I] it is clear that a contract which violates the laws of the United States and contravenes the public policy as expressed in those laws is unenforceable. . . . This is so regardless of the equities as between the parties for "* * * the very meaning of public policy is the interest of other than

> the parties and that interest is not to be at the mercy of the defendant alone.")

(footnote and citations omitted), *cert. denied*, 344 U.S. 856, 73 S. Ct. 89, 97 L. Ed. 664 (1952); *Ful-Vue Sales Co. v. American Optical Co.*, 118 F. Supp. 517, 529 (S.D.N.Y. 1953) (same); *Roberts v. Criss*, 266 F. 296, 301 (2d Cir. 1920) ("The defense of illegality may be set up, not as a protection to defendant, but as a disability in the Plaintiff.").

In the present case, the District Court made a specific finding that the promise at issue may violate public policy. As such, the District Court has the unavoidable duty to conclusively determine the public policy issue before that promise can be enforced.[16] *See, e.g.*, *Kaiser Steel Corp.*, 455 U.S. at 77, 102 S. Ct. at 856 ("The authorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way towards carrying out the terms of an illegal contract.") (citation and internal quotation marks omitted); Pet. App. at 18a, Aug. Op. at 354 ("'Where the enforcement of private agreements would be violative of [public] policy it is the obligation of courts to refrain from such exertions of judicial power.'") (quoting *Kaiser Steel Corp.*, 455 U.S. at 83-84, 102 S. Ct. at 859-60); *Oscanyan v. Arms Co.*, 103 U.S. 261, 267, 26 L. Ed. 539, 542 (1880) (public policy objection is one "which the court itself [is] bound to raise in the interest of the due administration of justice"); *Lee v. Johnson*, 116 U.S. 48, 52, 6 S. Ct. 249, 251 (1885) (same); *Roberts*, 266 F. at 302-03

---

16. As the cases cited *infra* in the text indicate, a public policy defense cannot be waived, even voluntarily, by a party. Thus, even though defendants previously made what the District Court deemed "binding admissions . . . concerning the validity of the HCP Agreement," *see* Pet. App. 13a, Aug. Op. at 352, the District Court must now resolve the public policy issue given its conclusion that the true facts may prove otherwise.

(same); *Noonan v. Gilbert*, 63 App.D.C. 30, 31, 68 F.2d 775, 776 (D.C. Cir. 1934) ("a court in the due administration of justice is bound to refuse its aid to enforce a contract that offends public policy"); *Sheffield Commercial Corp. v. Clemente*, 792 F.2d 282, 286 (2d Cir. 1986) ("court has duty to raise [public policy] issues sua sponte") (citing *California Pacific Bank v. Small Business Admin.*, 557 F.2d 218, 223 (9th Cir. 1977)); *Sagmel, Inc. v. Firebird Int'l Inc.*, 1995 WL 39460 at *3 (N.D. Ca. Jan. 31, 1995) (same); *Marock Intern., Inc. v. Brinkmann Corp.*, 1993 WL 349684 at *4 (S.D.N.Y. Sept. 13, 1993)

> Where a violation of public policy may be involved, courts may raise the issue *sua sponte* to assure that their authority is not abused. When the authority of a court is invoked, the court has a duty to assure that its powers are not employed in the service of objectives contrary to law or to any legally recognized public interest.

Insurance Co. of Am. v. S/S Cape Charles, 1994 WL 263592 at *2 (S.D.N.Y. June 3, 1994) (public policy challenge presents a "barrier" to recovery "'which the court itself [is] bound to raise in the interests of the due administration of justice'") (quoting *Nyhus v. Travel Management Corp.*, 466 F.2d 440, 447 (D.C. Cir. 1972)), *aff'd* 122 F.3d 1056 (2d Cir. 1995).

The District Court's refusal to take the obligatory action of resolving the public policy issue at trial, therefore, constituted a clear abuse of diseretion which the Second Circuit was required to redress. *Cf. McLee v. Chrysler Corp.*, 38 F.3d 67, 68 (2d Cir. 1994) (Mandamus appropriate where "[a] District Judge has declined to exercise decision-making authority entrusted to him, even after precedents obliging him to exercise such authority have been called to his attention.").

B. The Public Policy Defense Cannot Be Waived

The District Court abdicated its duty to resolve the public policy issue at trial because it concluded that defendants had waived the public policy defense. *See* Pet. App. at 22a, Aug. Op. at 356. No plausible reading of the authorities on the matter justifies the District Court's actions.

A public policy challenge to the enforceability of a contract cannot be waived. *Oscanyan*, 103 U.S. at 267, 26 L. Ed. at 542; *Lee*, 116 U.S. at 51-53, 6 S. Ct. at 250-51; *Beasley*, 191 U.S. at 498, 24 S. Ct. at 166 (Public policy "interest is not to be at the mercy of the defendant alone.") (citing *Northern P. R. Co.*, 142 U.S. at 509); *Wallace Oil Co., Inc. v. Michaels*, 839 F. Supp. 1041, 1045 (S.D.N.Y. 1993) ("Once a case is brought in the federal courts, the parties can no longer restrict the issues considered, even if the opposing party chooses to ignore some, if they might bar grant of the relief requested for reasons relevant to public policy.") (citing *Shelley v. Kraemer*, 334 U.S. 1, 68 S. Ct. 836, 92 L. Ed. 1161 (1948) (other citations omitted)); *see also, e.g.*, *Roberts*, 266 F. at 302-03; *Nyhus*, 466 F.2d at 447, 151 U.S.App.D.C. at 276; *Kaiser-Frazer Corp.*, 195 F.2d at 843-44; *Kidder, Peabody & Co. v. IAG Int'l Acceptance Group*, 1999 WL 11553 at *13 (S.D.N.Y. Jan. 13, 1999); *General Star Indem. Co. v. Platinum Indem. Ltd*, 2001 WL 883649 at *2 (S.D.N.Y. Aug. 7, 2001); *Insurance Co. of Am.*, 1994 WL 263592 at *2; *Pharmaceutical Sales and Consulting Corp. v. J.W.S. Delavau Co., Inc.*, 106 F. Supp. 2d 761, 767-68 (D.N.J. 2000); *I.U.B.A.C. Local Union No. 31 v. Anastasi Bros. Corp.*, 600 F. Supp. 92, 95 (S.D. Fla. 1984); *Sagmel, Inc.*, 1995 WL 39460 at *3; *Ful-Vue Sales Co.*, 118 F. Supp. at 529.

In its August opinion, the District Court rejected this manifest rule of law on the sole basis that, in each case cited by

defendants, "the court permitted the party to assert the [public policy] defense only after deciding that the plaintiff would not be prejudiced thereby." *See* Pet. App. at 16a, Aug. Op. at 353. The District Court's reading of the cases is erroneous. All of the decisions relied upon by defendants turned on the unique nature of the public policy defense and the interests it serves. In no instance did the cited ruling hinge on a preliminary finding that allowing the public policy defense would not prejudice the opposing party.[17]

Focus on the unique nature of the public policy defense, as opposed to prejudice, is not only supported by the plain language of the case law, but is also in line with this Court's precedent concerning, generally, the right to amend.

> In the absence of any apparent or declared reason – such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure

17. The District Court notes that this case was filed "nearly eight years ago." Pet. App. at 12a, Aug. Op. at 351. While the District Court is correct in this assertion, the District Court fails to note that nearly four of those eight years have been spent waiting for the Court to issue decisions on the motions of the parties, beginning with the parties' 1998 motions for summary judgment. For example, the District Court took over two years to decide plaintiff's motion to strike defendants' amended answer and over two and a half years to decide defendants' motion for reconsideration. Therefore, to the extent the District Court would justify its finding of waiver on a theory of undue delay, that justification is not only legally, but also factually, inaccurate. *Cf. Richardson v. Greenshields Securities, Inc.*, 825 F.2d 647 (2d Cir. 1987) (refusal of court to exercise its duty to decide motion constitutes a usurpation of power); *U.S. East Telecommunications, Inc. v. United States*, 15 F.3d 261, 263 (2d Cir. 1994) ("A Court confronted by a motion authorized by the Rules must decide the motion within a reasonable time. . . . [T]he right of a movant to have a motion decided is so clear that it will be enforced under proper circumstances by mandamus.") (footnote and citations omitted).

> deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. – the leave sought should, as the rules require, be "freely given."

Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 230, 9 L. Ed. 2d 222 (1962); *see Church of Scientology Intern. v. Time Warner, Inc.*, 1998 WL 575194 at *3 (S.D.N.Y. Sept. 9, 1998.) (Leisure, J.) (quoting *Block v. First Blood Associates*, 988 F.2d 344, 350 (2d Cir. 1993)) (same), *aff'd*, 238 F.3d 168 (2d Cir.), *cert. denied*, 534 U.S. 814, 122 S. Ct. 40, 151 L. Ed. 2d 13 (2001). This rule applies even if an affirmative defense is raised for the first time in a motion for summary judgment. *United States v. Big Apple Indus. Bldgs., Inc.*, 1993 WL 437787 at *6 (S.D.N.Y. Oct 26, 1993) (Leisure, J.) (citing *Block*, 9[8]8 F.2d at 350; *State Teachers Retirement Bd. v. Fluor Corp.*, 654 F.2d 843, 856 (2d Cir. 1981)).

If, as the District Court concluded, public policy can be waived due to prejudice, then public policy is no different than any other affirmative defense and the numerous decisions explicitly stating that, unlike other affirmative defenses, public policy cannot be waived ring hollow. *See, e.g., Sheffield Commercial Corp.*, 792 F.2d at 286 ("Traditional doctrines of waiver do not bar courts from considering whether a contract is illegal or violates statutory requirements designed to protect the general public."); *Kidder, Peabody & Co.*, 1999 WL 11553 at *13 ("However, while waiver is often the consequence for failure to plead most affirmative defenses, an affirmative defense alleging that a contract is illegal and should not be enforced on public policy grounds presents an exception to that general rule, as a number of courts have recognized.") (citing cases); *Insurance Co. of Am.*, 1994 WL 263592 at *2 ("The rule that

failure to plead an affirmative defense may result in waiver of that defense , . . does not apply to illegality of contract.") (citations omitted); *General Star Indem. Co.*, 2001 WL 883649 at *2

> Importantly, the affirmative defense which plaintiff seeks to raise should not be unforeseeable to any plaintiff or counter-plaintiff in a contractual dispute, even if the opposition fails to assert illegality in its reply. Generally, failure to plead an affirmative defense constitutes a waiver of that defense, but an affirmative defense alleging that a contract is illegal and should not be enforced on public policy grounds presents an exception to that rule.

(citations and internal quotation marks omitted); *Fieger v. Pitney Bowes Credit Corp.*, 2002 WL 31082955 at *7-*8 (S.D.N.Y. Sept. 17, 2002) ("under both federal and New York law, it is not absolutely necessary to plead the illegality of a contract which is also contrary to public policy") (citations and internal quotation marks omitted).

To date, neither the parties, nor the District Court, nor the Second Circuit have ever uncovered any case in which it was held that public policy could be waived if assertion of the defense would be prejudicial to the nonmovant.[18] To the contrary, in

---

18. In the brief he filed before the Second Circuit in opposition to defendants' petition for mandamus, plaintiff cited a district court decision, *Peralta Carriers Corp. v. Westvaco Corp.*, 1989 WL 433172 (S.D.N.Y. June 21, 1989), for the proposition that defendants' right to mandamus relief was not "clear and unmistakable." *See* Brief of Raymond Wechsler in Opposition to Mandamus ("Pl.'s Mandamus Br.") at pp. 20-21. Contrary to plaintiff's assertions, however, *Peralta*, has no application

(Cont'd)

line with the mandates of this Court's rulings on the matter, the decision of every court that has considered the issue indicate that public policy can never be waived.[19] Accordingly, the District Court cannot rely on a theory of waiver to avoid its obligation to resolve the public policy issue at trial.[20]

(Cont'd)

here. In *Peralta*, the court granted plaintiff's motion to preclude the defendant from asserting a defense of illegality. Unlike public policy, the defense of illegality is an affirmative defense specifically enumerated under Fed. R. Civ. P. 8(c). Moreover, the *Peralta* court's decision was based upon general principles of waiver not applicable here and did not address any of the cases or issues discussed herein.

19. As the Second Circuit has itself recognized, the public policy defense will be considered even if raised for the first time on appeal. *See Sheffield Commercial Corp.*, 792 F.2d at 286; *Cohen v. West Haven Bd. of Police Com'rs*, 638 F.2d 496, 500 n.6 (2d Cir. 1980); *In re Dinova*, 212 B.R. 437, 446 n.5 (2d Cir. Bankr. App. Panel 1997).

20. To the extent the District Court believed its August 2002 decision on the waiver issue was constrained by its February 2002 ruling that plaintiff would be prejudiced by the public policy defense, the Court was mistaken. *See* Pet. App. at 16a, Aug. Op. at 353 ("Because the Court has already held, in denying the motion to amend . . . that plaintiff will be prejudiced [by the public policy defense] . . . the Court finds that defendants have waived this defense and the present motion is procedurally improper.").

First, because the District Court's February 2002 ruling, at least to the extent it denied defendants leave to amend their answer to add the public policy defense, constituted "clear error," the law of the case doctrine should have been ignored. *See Virgin Atlantic Airways, Ltd v. National Mediation Board*, 956 F.2d 1245, 1255 (2d Cir), *cert. denied*, 506 U.S. 820, 113 S. Ct. 67, 121 L. Ed. 2d 34 (1992); *see also* Pet. App. at 23a, Aug. Op. at 356 n. 9 ("law of the case doctrine counsels against

(Cont'd)

II. PETITIONER HAS NO OTHER ADEQUATE MEANS TO OBTAIN THE DESIRED RELIEF

"Generally, mandamus is appropriate only where no other remedy adequately protects the petitioner's interest." *In re F.C.C.*, 217 F.3d at 133-34 (citation omitted); *see also, e.g., In re Austrian, German Holocaust Litigation*, 250 F.3d at 162 (A writ of mandamus "normally is not to be granted if the relief sought could be obtained by means of a direct appeal.") (citing *Helstoski v. Meanor*, 442 U.S. 500, 505-08, 99 S. Ct. 2445, 61 L. Ed. 2d 30 (1979); *Kerr v. United States District Court*, 426 U.S. 394, 403, 96 S. Ct. 2119, 48 L. Ed. 2d 725 (1976)). Such is the case here.

(Cont'd)

re-opening issues absent compelling circumstances, such as . . . the need to correct a clear error") (citing *Wilder v. Bernstein*, 645 F. Supp. 1292, 1310 (S.D.N.Y. 1986), *aff'd*, 848 F.2d 1338 (2d Cir. 1988)).

Second, the District Court's February 2002 conclusion that plaintiff will be prejudiced by the public policy defense is of no moment, because the public policy defense can be asserted at any time regardless of prejudice and regardless of the state of the pleadings. *See* text, *supra*; *see also Beasley*, 191 U.S. at 498, 24 S. Ct. at 166 (Once recognized, a public policy defense must be considered "whatever the pleadings."); *Roberts*, 266 F. at 302-03 ("The fact that the illegality of the agreement was not pleaded is of no moment.") (citing *Oscanyan*, 103 U.S. at 267, 26 L. Ed. at 542); *Lee*, 116 U.S. at 51-53, 6 S. Ct. at 250-51 (same); *United States v. Krieger*, 773 F. Supp. 580, 583 (S.D.N.Y. 1991) ("[T]he court may, *sua sponte*, 'step in and deny the right to any relief [under an agreement] without reference to the state of the pleadings, whenever it becomes apparent that the agreement is antagonistic to the interest of the public.'") (emphasis and second alteration in original) (citation omitted); 15 Corbin on Contracts § 1533 at p. 719 (When public policy requires non-enforcement and refusal of remedy "no court will fail to act in accordance with it on the mere ground that illegality was not pleaded.").

In a decision published in the official federal reporter, the District Court explicitly determined that there is a genuine issue of material fact as to whether the contract in question violates public policy. Absent the issuance of mandamus by the Second Circuit, however, the District Court will ignore over one-hundred years of this Court's clear and binding precedent and proceed to trial on the merits of plaintiff's contract action feigning that the public policy issue does not exist. Neither the judicial system nor the defendants may properly be subjected to such an unseemly exercise. *See* decisions cited *supra*.

A direct appeal after final judgment will not afford adequate relief. Even if it is ultimately determined on such an appeal that the District Court abdicated its duty to resolve the public policy issue, at that point, the damage will already have been done.[21] The judicial system's integrity will have already been tarnished by the District Court's willingness to enforce a contract it knows may violate public policy and its resources will have already been wasted on a trial. The Second Circuit's decision that such a result does not raise an exceptional circumstance justifying mandamus compounds the ill-effects of the District Court's error.[22] Similarly, on appeal, the right of defendants to have the

---

21. *See United States v. International Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO*, 907 F.2d 277, 280 (2d Cir. 1990) ("*Where an alternative procedure is available, however, 'exceptional circumstances' which 'show clearly the inadequacy' of that alternative procedure may still justify issuing the writ*") (emphasis added) (citation omitted)

22. *Cf. United States v. Balistrieri*, 779 F.2d 1191, 1205 (7th Cir. 1985)

> *To require a timely petition for a writ of mandamus as the sole remedy serves another important purpose: that of*
>
> (Cont'd)

public policy issue resolved before having to defend against plaintiff's underlying contract claim will already have been abrogated.[23]

The public policy issue must, accordingly, be resolved first. *See, e.g., Kaiser Steel Corp.*, 455 U.S. at 83, 102 S. Ct. at 859 ("[A] federal court has a duty to determine whether a contract violates federal law before enforcing it."). The Second Circuit, therefore, has a duty to issue mandamus here.

(Cont'd)

> *preventing injury to the public perception of the judicial system before it has a chance to occur.* If a party is deprived of his substantial rights in a trial before an actually biased judge, the harm can be remedied (though not costlessly) by a new trial before an unbiased judge. But the harm to the public's perception of the judicial system when a judge who appears to be biased proceeds in a case is more difficult to correct. Prevention in such circumstances is clearly preferable to attempts to cure.

(Emphasis added), *cert. denied, DiSalvo v. United States*, 475 U.S. 1095, 106 S. Ct. 1490, 89 L. Ed. 2d 892 (1986); *Union Carbide Corp. v. U.S. Cutting Service, Inc.*, 782 F.2d 710, 713 (7th Cir. 1986) (same).

23. As plaintiff conceded in his opposition to defendants' mandamus petition, issuance of a writ of mandamus is "appropriate if the ordinary appeals process would deprive the petitioner of the right it claims." Pl.'s Mandamus Br. at p. 12 (citing *In re F.C.C.*, 217 F.3d at 134).

CONCLUSION

Upon the foregoing, petitioners respectfully request that this Court grant certiorari in the present case.

Respectfully submitted,

BROOKS BANKER
BROOKS BANKER
551 Fifth Avenue
New York, NY 10176
(212) 972-0534

Counsel for Petitioners

On the Brief:
ANTHONY RELLA

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING APPLICATION FOR A WRIT OF MANDAMUS FILED JULY 2, 2003

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 2nd day of July, two thousand and three,

Present:

Hon. Guido Calabresi,
Hon. Fred I. Parker,
Hon. Robert D. Sack,

Circuit Judges.

02-3082

In re: Hunt Health Systems, LTD,
P & G Enterprises, Inc.,
MHTJ Investments, Inc.,
Esperanza Health Systems, LTD.
& Friendship, Inc.

Petitioners

Appendix A

Petitioner, through counsel, petitions for a writ of mandamus directing the direct court to resolve the issue of public policy at trial and to reassign the case. Upon due consideration, it is ORDERED that the petition is denied because there are no exceptional circumstances which justify mandamus relief. *See In re von Bulow*, 828 F.2d 94, 96 (2d Cir. 1987).

FOR THE COURT:
Roseann B. MacKechnie, Clerk

By: s/ Lucille Carr

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT FILED APRIL 24, 2003

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 24 day of April two thousand and three,

Present:

Hon. Guido Calabresi,
Hon. Fred I. Parker,
Hon. Robert D. Sack,

Circuit Judges.

02-3082

In re: Hunt Health Systems, LTD.,
P & G Enterprises, Inc.,
MHTJ Investments, Inc.,
Esperanza Health Systems, LTD.
& Friendship, Inc.,

Petitioner,

Appendix B

Petitioner, through counsel, petitions for a writ of mandamus directing the district court to resolve the issue of public policy at trial and reassign the case. Upon due consideration, it is ORDERED that, pursuant to Federal Rule of Appellate Procedure 21, the respondents are directed, and the district court is invited, to respond to petitioner's mandamus petition within 30 days of the date of this order.

FOR THE COURT:
Roseann B. MacKechnie, Clerk

By: s/ Lucille Carr

APPENDIX C — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED AUGUST 27, 2002

UNITED STATES DISTRICT COURT,
S.D. NEW YORK.

No. 94 CIV. 8294 (PKL).

Aug. 27, 2002.

Raymond H. **WECHSLER**, Administrative Trustee of the Towers Financial Corporation Administrative Trust,

Plaintiff,

v.

HUNT HEALTH SYSTEMS, LTD., P & G Enterprises, Inc., MHTJ Investments, Inc., Experanza Health Systems, Ltd. and Friendship, Inc.,

Defendants.

* * *

Appendix C

OPINION AND ORDER

LEISURE, District Judge.

Plaintiff Raymond H. Wechsler, the administrative trustee overseeing the assets of Towers Financial Corporation ("Towers"),[1] brings the underlying action against Hunt Health Systems, Ltd. ("Hunt Health") and affiliated entities for alleged breach of contract and fraudulent conveyance in connection with the parties' factoring agreements. Defendants bring the present motion pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, seeking summary judgment on public policy grounds. Plaintiff moves for sanctions pursuant to Rule 11 of the Federal Rules of Civil Procedure in response to defendants' motion and defendants' oppose the motion seeking sanctions against plaintiff. For the following reasons, defendants' motion for summary judgment is denied and plaintiff's motion for sanctions is granted.

I. *BACKGROUND*

The Court assumes familiarity with the previous decisions in this case. Because the prolix recitation of the facts has been set forth in earlier opinions of this Court, the Court discusses the facts only to the extent necessary to decide the instant motion.

---

1. As this Court has previously noted, by Order of United States Bankruptcy Judge Prudence Carter Beatty dated August 5, 1999, the Towers Financial Administrative Trust was terminated and the Trust's claim against Hunt Health was assigned to Raymond H. Wechsler in his personal capacity.

Appendix C

This case was first commenced by plaintiff in November 1994 alleging breach of contract and fraudulent conveyance in connection with the parties' factoring agreements. After five years of protracted discovery and several extensions of deadlines, this Court established as firm the deadline of May 30, 1999 for filing dispositive motions. Thereafter, both parties made cross-motions for summary judgment in the summer of 1998 which the Court granted in part and denied in part. *See Wechsler v. Hunt Health Sys., Ltd.*, No. 94 Civ. 8294, 1999 WL 397751 (S.D.N.Y. June 16, 1999) ("*Wechsler I*"). As further summarized in detail below, the Court was forced to deny summary judgment on many grounds because the parties had inadequately briefed the motions and had submitted internally contradictory papers.

In their moving papers in *Wechsler I*, filed with the Court on July 1, 1998, defendants argued that "Towers was . . . a massive Ponzi scheme," that its principal officers "misrepresented Towers' accounts receivable collection and factoring business, defrauded the company's bond and note holders, and plundered Towers' assets for personal gain." Defendants' Memorandum of Law in Support of Their Motion for Partial Summary Judgment, dated July 10, 1998, at 1-2. Further, defendants noted in their motion that Towers was eventually the subject of civil and criminal complaints and as a result was "unable to perform its primary obligations" to Hunt Health. *Id.* Defendants argued that Towers' alleged inability to perform the Health Care Purchase Agreement with Towers ("HCP Agreement"), due to its ongoing criminal activities, constituted a material breach, excusing Hunt Health's continuing obligations to perform. *See id.* at 32. In this Court's June 16, 1999 Opinion and Order,

the Court denied summary judgment in part because Towers' alleged breaches may have been excused by Hunt Health's previous alleged material breaches, and/or its voluntary early termination of the HCP Agreement. *See Wechsler I*, 1999 WL 397751, at *9.

In addition, in the same decision, the Court granted leave for plaintiff to amend his complaint to add certain additional claims against defendants, including a claim for liquidated damages arising as a result of Hunt Health's termination of the HCP Agreement. The Court found that defendants would not be prejudiced thereby because defendants had "notice of the liquidated damages dispute since October 1993, and . . . the issue ha[d] been extensively addressed in discovery." *Wechsler I,* 1999 WL 397751, at *15. Thereafter, plaintiff filed his First Amended Complaint on July 12, 1999. On July 19, 1999, defendants filed their First Amended Answer in which defendants attempted to add 21 new affirmative defenses and to substitute a new claim for rescission, without seeking leave of the Court. Many of these new defenses and the claim for rescission were based on a theory of fraud and illegality not previously raised by defendants at any point in the litigation prior to that date.[2]

---

2. This new theory of the case was premised upon the notion that "the HCP Agreement was from the beginning (1) 'tainted with illegality' and unenforceable; and (2) fraudulently induced and therefore subject to rescission." *Wechsler v. Hunt Health Sys. Ltd.*, 186 F.Supp.2d 402, 416- 17 (S.D.N.Y.2002) ("*Wechsler II*"). Among the affirmative defenses defendants sought to add were the defenses that the HCP Agreement was "unenforceable" "by reason of Towers' unclean hands" (Fourth Affirmative Defense); "by reason of Towers' breach of the implied covenant of good faith and fair dealing"

(Cont'd)

Appendix C

Plaintiff moved to strike and dismiss the new allegations, affirmative defenses, and counterclaims asserted in defendants' First Amended Answer and defendants responded by moving to amend their answer *nunc pro tunc,* and to conduct further discovery. *See* Defendants' Memorandum of Law in Opposition to Plaintiff's Motion to Strike and Dismiss and in Support of Defendants' Motion for Leave to Amend Answer *Nunc Pro Tunc* and to Conduct Further Discovery, dated August 26, 1999. Although acknowledging that their defenses and counterclaims based on fraud and illegality were new and thoroughly contradicted their binding admissions, defendants blamed the plaintiff for failing to disclose the facts underlying these new claims. In support of their motion to amend their answer, defendants relied principally on the same documentary evidence attached to their current motion for summary judgment, with testimony of S.E.C. counsel, Dorothy Heyl, Towers accountant Arthur Ferro, and Towers' Vice President Charles Chuggerman. *See* Affirmation in Support of Defendants' Motion for Summary Judgment, sworn to by Brooks Banker, Jr., Esq., dated May 31, 2002 ("Banker Aff."), Exs. G-I.

On February 20, 2002, this Court denied defendants leave to amend their answer *nunc pro tunc,* noting that fact discovery had been closed since 1998, after years of

---

(Cont'd)

(Fifth Affirmative Defense); "by reason of Towers' fraud upon defendants" (Sixth Affirmative Defense); "by reason of illegality and Towers' reliance thereon to further its Ponzi scheme" (Seventh Affirmative Defense); and "by reason of public policy" (Eight Affirmative Defense). Defendants' First Amended Answer, dated July 19, 1999, ¶¶ 107-111.

"extensive discovery" and that the initial summary judgment motion had been decided in June 1999. *See Wechsler v. Hunt Health Sys. Ltd.*, 186 F.Supp.2d 402, 417 (S.D.N.Y.2002) ("*Wechsler II.*"). Moreover, this Court concluded at that time that defendants did not offer a reasonable explanation was to why the evidence should be considered "new" especially because defendants had long been aware of Towers' illegal activities. *See id.* at 418. In particular this Court noted that defendants knew of the criminal activity "at the time they terminated the HCP Agreement in February 1993, at the time they filed their November 12, 1993 Proof of Claim, at the time they filed their original answer and counterclaim in January 1994, and at the time they filed their dispositive motion in July 1998." *Id.* Further, the Court made it clear that despite their knowledge of Towers' illegal activities, up until defendants' belated motion to amend their answer, they had chosen to pursue a breach of contract defense and claim based on conduct by Towers commencing in February 25, 1999, and not an action based upon a theory of fraud and illegality. *See id.* In prior binding admissions, defendants admitted the validity and enforceability of the HCP Agreement, its amendments, and the Guarantees. Defendants' contention up until that point in the litigation was not that the agreements were from the very beginning fraudulently induced and unenforceable, but rather that *after* Towers' alleged breach on February 25, 1993, these agreements ceased to be valid and enforceable. *See id.*

Most importantly, this Court held that such a radical shift in gears would be unduly prejudicial to the plaintiff at that point in the case. *See id.* Plaintiff rightfully assumed that this new theory of the case was not an issue and, as a result,

an examination of the underpinnings of the new theory would require an entirely new round of discovery that would substantially delay the resolution of the action. *See id.*

On April 18, 2002, this Court decided plaintiff's renewed motion for partial summary judgment, the last pending dispositive motion, and ordered the parties to appear for a pre-trial conference on May 6, 2002 in order to set a trial date and a date for submission of the pre-trial order. *See Wechsler v. Hunt Health Systems, Ltd.*, 198 F.Supp.2d 508 (S.D.N.Y.2002) ("*Wechsler III*"). On May 1, 2002, days before the scheduled conference, defendants submitted a letter to the Court indicating the possibility that defendants would make a motion to dismiss the complaint on public policy grounds. *See* Letter to Judge Leisure from Brooks Banker, Jr., Esq., dated May 1, 2002. At the pre-trial conference on May 6, 2002, defendants' counsel, Mr. Banker, reiterated his intent to file the present motion, an intention that plaintiff's counsel strongly opposed. The Court noted at that time that it cannot prevent a party from bringing a motion it is entitled to bring under the Federal Rules of Civil Procedure, but threatened sanctions against defendants if, after reviewing the motion, the Court found the motion to be frivolous.[3] Plaintiff requested that the Court set a trial date,

---

3. It is well settled that this Court cannot prevent a party from making a motion that it is entitled to bring under the Federal Rules of Civil Procedure. *See Eisemann v. Greene*, 204 F.3d 393, 397 (2d Cir.2000) ("Although we have recognized that it is within the judge's discretion to hold a pre-motion conference for the purpose of persuading a party not to file a perceived meritless motion, we have made it clear that the judge may not require that the court's

(Cont'd)

but because of the forthcoming motion the Court was forced to delay scheduling dates for submission of the pre-trial order and the trial date, and instead set a briefing schedule for the present motion.

Thereafter, on May 31, 2002, defendants filed the present motion for summary judgment based upon public policy grounds. After seeking leave of the Court, plaintiff subsequently filed a motion for sanctions on July 26, 2002.

II. *DISCUSSION*

A. *Procedure*

This case was originally filed in November 1994, nearly eight years ago. Since that original filing, the parties have engaged in years of protracted discovery and have filed separate summary judgment decisions, a motion for reconsideration, various motions to strike, and a motion to amend. The Court has attempted at each phase of this complex case to clarify the issues in dispute in an effort to streamline the case for trial. Much of the delay in resolving this laborious case has resulted from both parties' continued

---

(Cont'd)

permission be secured at such a conference before a party may file the motion.") (internal quotations omitted); *see also Richardson Greenshields Secs., Inc. v. Lau,* 825 F.2d 647, 652 (2d Cir.1987) ("Absent extraordinary circumstances, such as a demonstrated history of frivolous and vexatious litigation, or a failure to comply with sanctions imposed for such conduct, a court has no power to prevent a party from filing pleadings, motions or appeals authorized by the Federal Rules of Civil Procedure.") (internal citations omitted).

failure to communicate and their often inadequate submissions to the Court. The Court has indicated to the parties at various times throughout this litigation its consternation with this manner of proceeding.[4]

The current motion follows in line with this pattern. This Court denied defendants' motion to amend *nunc pro tunc* in *Wechsler II*, based in large part upon the binding admissions made by defendants concerning the validity of the HCP Agreement, and the prejudice that plaintiff would suffer as a result of defendants seeking to change their entire theory of the case. *See Wechsler II,* 186 F.Supp.2d at 419. Instead of seeking a motion for reconsideration of that denial, or instead of submitting to the Court their public policy non-waiver theory in that motion to amend, defendants waited until this late stage of the case to file a new summary judgment motion.

---

4. Indeed, in the most recently decided dispositive motion, the Court chastened that "[i]t should be stressed that the Court has been sorely disappointed by the vitriolic tone of this litigation that has proven to be, at times, quite unproductive. Although attorneys should, by all means, represent their clients' interests fully during the course of a litigation, the tortured history of this case reveals that combativeness is not always the most efficient route." *Wechsler III,* 198 F.Supp.2d at 529. Moreover, the Court's frustration was noted as early as the first summary judgment decision decided on June 16, 1999. *See Wechsler I,* 1999 WL 397751, at *4 ("[T]he Court notes its consternation at the parties' severe underdevelopment or outright omission of arguments . . . as well as . . . presentation of arguments that seem to contradict other arguments made by the same party. These shortcomings have . . . made the Court's assessment far more onerous that it should have been. . . .").

Appendix C

The current motion, stylized as a summary judgment motion, is in essence an attempt to obtain reconsideration of the Court's February 20, 2002 decision in *Wechsler II* denying defendants' motion to amend their answer *nunc pro tunc.* As the defendants well know, a motion for reconsideration pursuant to Local Civil Rule 6.3 must be brought within 10 days of the judgment, a deadline that had long since passed at the time they filed the present motion.

Defendants now urge the Court to grant summary judgment based upon one of the very claims they sought to be amended to their answer, that "the agreements executed between Towers and Hunt Health were used by Towers in furtherance of federal criminal violations, and as such, are unenforceable by plaintiff on the grounds of public policy." Defendants' Memorandum of Law in Support of Their Motion for Summary Judgment, dated May 31, 2002 ("Defs.' Mem."), at 7. While acknowledging that their answer does not contain the public policy defense, defendants argue that "such omission does not bar a substantive determination on the criminality of Towers' healthcare factoring scheme." *Id.* Recognizing their inherent problem in that this Court already denied a motion to amend their answer to add this defense, defendants add in a footnote that "[a]lthough in its February 2002 opinion, the Court accepted Plaintiff's argument that, *as a matter of procedure,* defendants could not amend their answer to include a defense based on fraud, the Court has never ruled or opined on the *merits* of defendants' public policy claim." *Id.* at 7 n. 4 (emphasis in original). However, the Court did not reach the merits of defendants' illegality and fraud defenses and theories in

Wechsler II precisely because the motion to amend failed procedurally, and so the Court held it need not consider the merits of any of the new affirmative defenses and allegations.[5]

Defendants acknowledge the distinction between a motion to amend and a summary judgment motion. They argue in one instance that there is an "essential difference" between "a Rule 15 motion to amend, which is procedural, and a Rule 56 motion for summary judgment, which is substantive." Defendants' Reply Memorandum of Law, dated June 28, 2002 ("Defs' Reply"), at 5. However, defendants then go on to justify the filing of this current motion by highlighting "the Court's *refusal* to address the merits of defendants' public policy defense." Defendants' Memorandum in Opposition to Plaintiff's Motion for Sanctions, dated Aug. 6, 2002 ("Defs' Opp. Sancts."), at 6 (emphasis added). These two statements elucidate the contradiction in defendants' positions. In order to surmount this problem, defendants for the first time raise the issue that a defense based upon public policy and illegality cannot be waived.

Generally, pursuant to Rule 8(c) of the Federal Rules of Civil Procedure, failure to plead an affirmative defense under Rule 8(c) results in a waiver of that defense and its exclusion from the case. *See* Fed.R.Civ.P. 8(c). However, some courts have held that an affirmative defense alleging that a contract

5. Indeed the Court held that it did not need to analyze plaintiff's "futility" argument attacking the substance of the proposed amendment because the Court had "otherwise denied leave to amend based on undue delay and prejudice." *Wechsler II,* 186 F.Supp.2d at 419 n. 9.

is illegal and should not be enforced on public policy grounds presents an exception to that general rule. *See, e.g., Kidder, Peabody & Co. v. IAG Int'l Acceptance Group,* No. 94 Civ. 4725, 1999 WL 11553, at * 13 (S.D.N.Y. Jan.13, 1999) (denying motion to strike illegality defense). Defendants cite several cases to support this theory, but in each case the court permitted the party to assert the defense only after deciding that the plaintiff would not be prejudiced thereby. *See, e.g., General Star Indem. Co. v. Platinum Indem. Ltd.,* No. 00 Civ. 4960, 2001 WL 883649, at *2 (S.D.N.Y. Aug.7, 2001) (no prejudice in allowing amendment to include illegality defense); *Kidder,* 1999 WL 11553, at *14 (no waiver where failure to plead did not prejudice plaintiff because defendant raised illegality issue in several prior depositions). Because the Court has already held, in denying the motion to amend *nunc pro tunc* in *Wechsler II*, that plaintiff will be prejudiced if defendants were to completely shift gears and assert this defense at this point in the litigation, resulting in a probable new round of discovery, the Court finds that defendants have waived this defense and the present motion is procedurally improper.

B. *Substantive*

Because the Court has denied defendants' request to include a public policy defense, the Court need go no further. However, for the sake of thoroughness, the Court notes that, even if defendants were correct that they have not waived the public policy defense, and even if the Court were to grant leave to amend the answer to include such a defense, the Court would deny summary judgment on this ground for the following reasons.

Appendix C

A moving party is entitled to summary judgment if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment a matter of law." Fed.R.Civ.P. 56(c); *see also Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Holt v. KMI-Continental Inc.,* 95 F.3d 123, 128 (2d Cir.1996). When considering a motion for summary judgment, the Court's responsibility is not "to resolve disputed issues of fact but to assess whether there are any factual issues to be tried." *Knight v. U.S. Fire Ins. Co.,* 804 F.2d 9, 11 (2d Cir.1986). In determining whether genuine issues of material fact exist, the Court must resolve all ambiguities and draw all justifiable inferences in favor of the nonmoving party. *See Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Holt,* 95 F.3d at 129.

The moving party bears the burden of demonstrating that no genuine issue of material fact exists. *See Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 157, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970); *Gallo v. Prudential Residential Servs., L.P.,* 22 F.3d 1219, 1223-24 (2d Cir.1994). "[T]he movant's burden will be satisfied if he can point to an absence of evidence to support an essential element of the nonmoving party's claim." *Goenaga v. March of Dimes Birth Defects Found.,* 51 F.3d 14, 18 (2d Cir.1995). Once the moving party discharges his burden of demonstrating that no genuine issue of material fact exists, the burden shifts to the nonmoving party to offer specific evidence showing that a genuine issue for trial exists. *See Celotex,* 477 U.S. at 324, 106 S.Ct. 2548. The nonmoving

party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). "A 'genuine' dispute over a material fact only arises if the evidence would allow a reasonable jury to return a verdict for the nonmoving party." *Dister v. Continental Group,* 859 F.2d 1108, 1114 (2d Cir.1988) (quoting *Liberty Lobby,* 477 U.S. at 248, 106 S.Ct. 2505).

It is beyond cavil that federal courts will not enforce illegal promises. *See Kaiser Steel Corp. v. Mullins,* 455 U.S. 72, 77, 102 S.Ct. 851, 70 L.Ed.2d 833 (1982). Indeed, the Supreme Court has opined that:

> a federal court has a duty to determine whether a contract violates federal law before enforcing it. "The power of the federal courts to enforce the terms of private agreements is at all times exercised subject to the restrictions and limitations of the public policy of the United States as manifested in . . . federal statutes. . . . Where the enforcement of private agreements would be violative of that policy it is the obligation of courts to refrain from such exertions of judicial power."

Id. at 83-84, 102 S.Ct. 851 (citing *Hurd v. Hodge,* 334 U.S. 24, 34-35, 68 S.Ct. 847, 92 L.Ed. 1187 (1948) (footnotes omitted)). Much of the case law that has developed concerns cases involving contracts made in connection with antitrust conspiracies. In those cases, courts have signaled that the determinative question in deciding if a contract is void and

unenforceable, is whether the contract at issue constituted " 'an intelligible economic transaction in itself.'" *Viacom Int'l Inc. v. Tandem Productions, Inc.*, 526 F.2d 593, 597 (2d Cir.1975) (quoting *Kelly v. Kosuga*, 358 U.S. 516, 79 S.Ct. 429, 3 L.Ed.2d 475 (1959)). When that is true, enforcement of the contract would not make the courts a party to "the carrying out of the very restraints forbidden by' or 'the precise conduct made unlawful by' the [relevant statute]." *Id.* Thus, if a contract is not itself illegal, the bargain may still be illegal if it is closely connected with an unlawful contract. *See Contemporary Mission Inc. v. Bonded Mailings, Inc.*, 671 F.2d 81, 83 (2d Cir.1982) (citing 15 Williston, Contracts § 1752 (3d ed.) (1972)); *Bankers Trust Co. v. Litton Sys., Inc.*, 599 F.2d 488, 491 (2d Cir.1979) ("[A] contract would be unenforceable in a suit brought by the wrongdoer if there were a direct connection between the illegal bribe and the obligation sued upon. . . ."). Therefore, if a contract is merely collaterally and not directly connected with the illegal act, the contract will be valid and enforceable. *See Contemporary Mission*, 671 F.2d at 83 (citing *McConnell v. Commonwealth Pictures Corp.*, 7 N.Y.2d 465, 199 N.Y.S.2d 483, 166 N.E.2d 494 (1960)).

Underlying this precedent is the Supreme Court's paramount concern with the risk of generating a windfall for the moving party. A court must be careful in its analysis before declaring certain contracts to be void, because there is a general policy "of preventing people from getting other people's property for nothing when they purport to be buying it." *Kelly*, 358 U.S. at 520-21, 79 S.Ct. 429 (quoting *Continental Wall Paper Co. v. Louis Voight & Sons Co.*, 212 U.S. 227, 271, 29 S.Ct. 280, 53 L.Ed. 486 (1909) (Holmes,

J., dissenting)); *see Viacom,* 526 F.2d at 599 ("[T]he overriding consideration . . . is . . . that the successful interposition of [illegality] defenses is too likely to enrich parties who reap the benefits of a contract and then seek to avoid the corresponding burdens."). Indeed, courts must be mindful of the general rule that "'competent persons shall have the utmost liberty of contracting and that their agreements voluntarily and fairly made shall be held valid and enforced in the courts' unless a violation of the law or public policy is clear and certain." *Wheelabrator Envtl. Sys., Inc. v. Galante,* 136 F.Supp.2d 21, 30 (D.Conn.2001) (quoting *Twin City Pipe Line Co. v. Harding Glass Co.,* 283 U.S. 353, 356-57, 51 S.Ct. 476, 75 L.Ed. 1112 (1931)).[6]

Defendants argue that although the HCP Agreement when considered in a vacuum is "seemingly valid and enforceable," in the context of "Towers' elaborate, massive Ponzi scheme, any aura of legitimacy surrounding those contracts quickly

---

6. Defendants assert that if the Court should declare the HCP Agreement to be unenforceable they will not be the recipients of a windfall because the accounts assigned to Towers went largely uncollected and they were worth in excess of $2,000,000. *See* Defs' Reply at 7 n. 11; Defs' Mem. at 17-18. Moreover, they argue because public policy is concerned with the interests of justice and not the interests of individual parties, even if defendants would be the beneficiaries of such a windfall, they are still entitled to judgment as a matter of law. *See* Defs' Reply, at 7 n. 11; Defs' Mem. at 9. The Court finds no merit to these assertions. As the following discussion makes clear, the Court does not find that the HCP Agreement and its related agreements constitute a clear and certain connection to illegality that would violate public policy. Both parties freely entered into this contract, an "intelligible economic transaction in itself," and received benefits from it.

and thoroughly dissipates." Defs' Mem. at 11. They go on to contend that there is no dispute that Towers used the proceeds of the HCP Agreement "as a vehicle to promote its Ponzi scheme." *Id.* Key to their position is the assertion that the case law supports the idea that the central question in determining whether a contract should be declared void on public policy grounds is whether Towers entered into the agreement for "an illegal purpose." Defs' Mem. at 11 (citing *Sender v. Simon,* 84 F.3d 1299, 1307 (10th Cir.1996)). Defendants' principal reliance on *Sender* holds no precedential value for this Court, and further, the facts of that case differ markedly from the facts of the present case.

In *Sender,* a Tenth Circuit case, the plaintiff sued upon the same investment vehicles which were the basis for the Ponzi scheme at issue in that case. *See* 84 F.3d at 1308 ("[T]his court will not aid the effort of a fraudulent entity that used the trappings of legal formality to lure its victims to turn around and try to hold its victims accountable under those same legal formalities."). In essence, the Court held the agreements to be unenforceable because investors were induced to enter them based on fraudulent and illegal promises as to the investment's health and profitability.

In this case, the investment vehicle which formed the basis of Towers' Ponzi scheme, that is, the notes and bonds obtained by Towers based on fraudulent misrepresentations as to the value of the investment, are not directly at issue. Instead, defendants are seeking to "invalidate a contract that is collateral to the investment vehicles, pursuant to which defendants admit that Towers performed valid services of which it obtained the benefit in consideration of paying a

fee for its factoring services." Pl's Opp. at 10 n. 7. It seems to be collateral to the HCP Agreement itself that the value of the accounts receivable purchased by Towers from Hunt Health may have been exaggerated in Towers' representations *to its bond bolder investors.*[7]

Drawing all reasonable inferences in plaintiff's favor, the Court finds, therefore, that even if the public policy defense had not been waived, and it has, there remains a genuine issue of material fact with regard to a public policy defense and that summary judgment in favor of defendants is denied. Assuming that defendants also are seeking leave to amend their answer to include this defense at trial,[8] that request is denied as it is the law of the case that they were denied leave to amend *nunc pro tunc* in *Wechsler II*,[9] and the Court now holds that they have waived this defense for trial.

---

7. Defendants contend that testimony of Arthur Ferro, Towers' accountant, from the Towers' criminal trial supports the fact that the HCP Agreement was entered into for a "wrongful purpose." Defs' Mem. at 12 n. 12. They cite Ferro's statement that before entering into the healthcare business, Mitch Brater felt that it could be the "salvation of the company." *See id.* (citing Banker Aff., Ex. H, at 807).

8. Defendants presume, in their response to plaintiff's motion for sanctions, that if the Court denies summary judgment, "the public policy issue will be decided at trial." Defs' Opp. Sancts. at 2 n. 3. This arguably evinces an intent on the part of defendants to utilize this summary judgment motion to bypass this Court's ruling denying their motion to amend in *Wechsler II*.

9. *See DiLaura v. Power Auth. of State of New York*, 982 F.2d 73, 76 (2d Cir.1992) (McLaughlin, J.) ("The law of the case doctrine

(Cont'd)

Appendix C

III. *SANCTIONS*

Plaintiff moves for sanctions against defendants and/or their counsel pursuant to Fed.R.Civ.P. 11(c) and 28 U.S.C. § 1927. *See* Plaintiff's Memorandum of Law in Support of Plaintiff's Motion for Sanctions, dated June 26, 2002 ("Pl's Mem Sancts."), at 1. Pursuant to Rule 11(b),

> [b]y representing to the court . . . a . . . written motion . . . , an attorney . . . is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,—

(Cont'd)

'posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.'") (quoting *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 816, 108 S.Ct. 2166, 100 L.Ed.2d 811 (1988)); *Wilder v. Bernstein*, 645 F.Supp. 1292, 1310 (S.D.N.Y.1986), *aff'd*, 848 F.2d 1338 (2d Cir.1988) (law of the case doctrine counsels against re-opening issues absent compelling circumstances, such as intervening changes of controlling law, availability of new evidence, or the need to correct a clear error or manifest injustice). Indeed, the law of the case doctrine ensures "the orderly progress of court proceedings." *Siderpali, S.P.A. v. Judal Indus., Inc.*, 833 F.Supp. 1023, 1027 (S.D.N.Y.1993). Moreover, the Second Circuit has indicated that generally, "where litigants have once battled for the court's decision, they should neither be required, nor without good reason permitted, to battle for it again." *International Ore & Fertilizer Corp. v. SGS Control Servs., Inc.*, 38 F.3d 1279, 1287 (2d Cir.1994) (citing *Zdanok v. Glidden Co., Durkee Famous Foods Div.*, 327 F.2d 944, 953 (2d Cir.), *cert. denied*, 377 U.S. 934, 84 S.Ct. 1338, 12 L.Ed.2d 298 (1964)).

> (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
>
> (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for extension, modification, or reversal of existing law or the establishment of new law; . . . .

Fed.R.Civ.P. 11(b).

A pleading, motion, or paper violates Rule 11 if it is frivolous, legally unreasonable, or factually without foundation, even though not signed in subjective bad faith. *See Simon DeBartolo Group, L.P. v. The Richard E. Jacobs Group, Inc.*, 186 F.3d 157, 167 (2d Cir.1999) ("To constitute a frivolous legal position for purposes of Rule 11 sanctions, it must be clear under existing precedents that there is no chance of success and no reasonable argument to extend, modify or reverse the law as it stands.") (internal quotations omitted).

Plaintiff also seeks sanctions under 28 U.S.C. § 1927, which provides in pertinent part that:

> [a]ny attorney . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct

28 U.S.C. § 1927.

"By its terms, § 1927 looks to unreasonable and vexatious multiplications of proceedings; and, it imposes an obligation on attorneys throughout the entire litigation to avoid dilatory tactics." *United States v. International Bhd. of Teamsters,* 948 F.2d 1338, 1345 (2d Cir.1991) (McLaughlin, J.). The purpose of the statute is to deter unnecessary delays in litigation and bad faith is the "touchstone of an award under [the] statute." *Id.* The court's factual findings of bad faith must be characterized by "a high degree of specificity." *Milltex Indus. Corp. v. Jacquard Lace Co., Ltd.,* 55 F.3d 34, 37-38 (2d Cir.1995) (quoting *Oliveri v. Thompson,* 803 F.2d 1265, 1272 (2d Cir.1986), *cert. denied,* 480 U.S. 918, 107 S.Ct. 1373, 94 L.Ed.2d 689 (1987)). However, courts will infer bad faith "when the attorney's actions are so completely without merit as to require the conclusion that they must have been undertaken for some improper purpose such as delay." *ACLI Gov't Secs., Inc. v. Rhoades,* 907 F.Supp. 66, 68 (S.D.N.Y.) (citing *Keller v. Mobil Corp.,* 55 F.3d 94, 99 (2d Cir.1995)).[10]

---

10. There are significant differences between a motion for sanctions under Rule 11 and § 1927. As the Second Circuit has noted, Rule 11 sanctions may be imposed on both counsel and client, while § 1927 applies only to counsel; a Rule 11 violation must be based on signed pleadings, motions, or other papers, while § 1927 violations do not depend on the presence of a paper; Rule 11 may not be used to sanction obnoxious conduct during the course of the litigation; whereas § 1927 applies to the unreasonable and vexatious multiplication of court proceedings. Further, Rule 11 requires only a showing of objective unreasonableness on the part of the attorney or client signing the papers, but § 1927 requires more: subjective bad faith by counsel. Finally, misconduct under Rule 11 must be judged as of the time the paper was signed, whereas § 1927 invites attention

(Cont'd)

Appendix C

The procedural background of this motion for summary judgment supports an inference of bad faith in bringing this motion. Defendants sought to amend their answer, first without leave of the Court, and then sought amendment *nunc pro tunc* on the precise issue of *inter alia* the defense of public policy, all without raising the legal issue regarding non-waiver of public policy defenses. Instead of bringing a motion for reconsideration, on the eve of this Court's pre-trial conference to set a trial date for what has become a case of Byzantine complexity, defendants sought this procedurally unsound motion for summary judgment. In this case, therefore, the Court finds bad faith on the part of defendants for filing this motion and sanctions are warranted. *See Virgin Atlantic Airways, Ltd. v. National Mediation Board,* 956 F.2d 1245, 1254 (2d Cir.), *cert. denied,* 506 U.S. 820, 113 S.Ct. 67, 121 L.Ed.2d 34 (1992) (affirming Rule 11 sanctions even though district court erred in denying original motion to dismiss, because district court did not impose sanctions for substance of defendant's motion, but rather because making the subsequent motion at that juncture, given Local Rule 3(j) and the law of the case doctrine, was not justified by existing law or a good faith argument for the extension, modification, or reversal of existing law).

Therefore, because defendant has sought to needlessly delay this action, and because the Court finds the motion was objectively unreasonable and brought in bad faith, plaintiff's motion for sanctions pursuant to Rule 11 and

---

(Cont'd)

to a course of conduct, and imposes a continuing obligation on attorneys to avoid dilatory tactics. *See International Bhd. of Teamsters,* 948 F.2d at 1345-46.

§ 1927 is granted.[11] Plaintiff's attorneys are directed to submit an affidavit setting forth the total hours spent and legal services rendered in connection with defendants' summary judgment motion and plaintiff's motion for sanctions, as well as counsel's hourly fee.[12]

IV. *CONCLUSION*

For the foregoing reasons, defendants' motion for summary judgment is hereby DENIED; and plaintiff's motion for sanctions is hereby GRANTED. Both parties are

---

11. The Court, therefore, declines to grant defendants' request for sanctions in responding to plaintiff's motion for sanctions.

12. Attached to the Affidavit of Daniel J. Kelly, Esq. in Support of Plaintiff's Motion for Sanctions, sworn to on June 27, 2002 ("Kelly Aff."), as Exhibit 5 is an affirmation by Mr. Kelly of the legal fees and expenses incurred as of June 19, 2002 in connection with plaintiff's opposition to defendants' motion for summary judgment and plaintiff's motion for sanctions. The motion for sanctions was first filed under the "safe harbor" provisions of Rule 11(c)(1)(A) (entitling defendants 21 days to withdraw their motion before the Rule 11 motion is filed with the Court). Therefore, plaintiff must supplement the list of fees and expenses incurred up until the time of filing on July 26, 2002. However, it should be noted that the Court has reviewed the list of fees and expenses through June 19, 2002, as explicated in Exhibit 5 of the Kelly Aff., and notes that defendants need not pay for all fees and expenses regarding the May 6, 2002 conference. That conference was scheduled as a pre-trial conference and would have taken place regardless of defendants' motion for summary judgment. Accordingly, $2,625 in time billed and $987.95 in ground transportation, parking, business meal, and travel expenses shall be deducted from the total sum.

Appendix C

ORDERED to appear for a pre-trial conference before this Court in Courtroom 18B at the United States Courthouse, 500 Pearl Street, New York, New York, on September 9, 2002 at 10:30 a.m. when the Court will set a trial date and a date for submission of the pre-trial order.

SO ORDERED.